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Public trust in our national forests| Development of an administrative framework for public administration of environmental resources

James Peter Betty
The University of Montana

THE PUBLIC TRUST IN OUR NATIONAL FORESTS: DEVELOPMENT OF AN ADMINISTRATIVE FRAMEWORK FOR PUBLIC ADMINISTRATION OF ENVIRONMENTAL RESOURCES

by

James P. Betty

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Approved by:

Robert F. Wambach
Chairman, Board of Examiners

John M. Stewart
Dean, Graduate Division

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CHAPTER I

INTRODUCTION

According to Charles Reich in his widely read article Bureaucracy and the Forests, "the forests of our nation are a vast experiment in public ownership."[1] It would be as accurate to state that the forests of our nation are a vast experiment in public administration. Article IV, Section III, of the United States Constitution, is the source of power for the Congressional delegation of broad, sweeping powers to specific governmental agencies for the administration of the national forests.[2] The subject of this paper will be limited to the United States Forest Service administrative procedure as it affects the agency's interaction

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[1]C. A. Reich, "Bureaucracy and the Forests" (Center for the Study of Democratic Institutions at Santa Barbara, California, 1962).

[2]The Forest Reserve Act of 1897 (30 Stat. 34, 16 U.S.C. 551) imposed upon the Secretary of the Interior the duty to "preserve the national forests . . . from destruction" by regulating their "occupancy and use." In 1905 these duties and powers were transferred to the United States Forest Service under the Department of Agriculture by the Act of February 1, 1905 (33 Stat. 628, 16 U.S.C. 472). Today, three executive agencies control the nation's forests: the Forest Service in the Department of Agriculture, and the National Park Service and the Bureau of Land Management, both in the Department of Interior. This paper will address itself particularly to the Forest Service because it administers the largest share of the nation's forests and all of the public lands reserved as "national forests."

with the public. The author will superimpose the doctrine of public trust upon the Forest Service responsibility of "public" administration for the purpose of highlighting any present weaknesses, and to describe the potential of the doctrine as an administrative framework for public administration of environmental resources.

Since the early 1960's, the Forest Service has come under some particularly sharp public criticism. Adverse environmental impacts on national forests have become matters of public record and concern.[3] Government agencies, often held out as the "whipping boy" for the environmental ills of the country,[4] are alleged to be self-perpetuating, bureaucratic monoliths often unresponsive to public interests.[5] The Forest Service is not immune from these allega-

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[3]W. F. Lally, "Crisis on the Public Lands," Suffolk University Law Review (Vol. 6, Fall 1971). pp. 104, 107-110. See also: University of Montana "Bolle Report," (S. Doc. 91-115, 91st Cong., 2d Sess., 14, 1970). This report concluded that citizen concern for Forest Service management was based upon U.S.F.S. "overriding concern for sawtimber production" and its "insensitivity to the related forest uses . . . and the public interest in environmental values." New York Times, November 14, 1971, p. 60, Col. 2. New York Times, November 15, 1971, p. 48, Col. 1.

[4]L. L. Jaffe, "The Federal Regulatory Agencies in Perspective: Administrative Limitations in a Political Setting," Boston College Law Review (Vol. 11, May 1970), p. 565.

[5]See generally: Ibid., pp. 565, 569, "bureaucracies tend to become somewhat ingrown, attached to their own concepts of policy and resentful of outside pressures, particularly those which they feel they can ignore." Also: C. A. Reich, "The Public and the Nation's Forests," California Law Review (Vol. 50, August 1962), p. 381. R. L. Ottinger, "Leg-

tions. This onslaught of citizen confrontation is placing demands on the administrative functions of the agency as the Forest Service relates to concerned public interests. Citizens are battling in the courtroom,[6] seeking to limit agency discretion through mandatory legislation,[7] advocating "environmental management" of public forests,[8] and demanding a new set

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islation and the Environment: Individual Rights and Government Accountability," Cornell Law Review (Vol. 55, 1970), p. 666. See also: Testimony of J. L. Sax before the Committee on Conservation and Recreation, House of Representatives of Michigan, on H.B. 3055, January 21, 1970: "Official agencies which are created to promote and protect the public interest sometimes become too single-minded. In the past few years, a number of cases have brought home the degree to which important regulatory agencies failed to take into account all the information and all the perspectives which a proper regard for the public interest required."

[6]Jaffe, op. cit., p. 568. "In a period in which many of the agencies have settled into unenterprising routines, the courts have set about to reawaken these agencies to their responsibilities for active and forward-looking decisions." See also: J. L. Sax, "The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention," Michigan Law Review (Vol. 68, January 1970), p. 473. "Private citizens no longer willing to accede to the efforts of administrative agencies to protect the public interests, have begun to take the initiative themselves." Also: Sierra Club v. Hickel (N.D. California, July 23, 1969); overruled by Sierra Club v. Morton (92 S.Ct. 1361, April 1972). Parker v. United States (309 F. Supp. 593, D. Colo., 1970). The West Virginia Highlands Conservancy v. Island Creek Coal Co. (Civil #70182-E, N.D. W. Va., June 1970). Gandt v. Hardin (Civil #1334, W.D. Michigan, 1969).

[7]Wilderness Act of 1964 (16 U.S.C. 1131-1136). National Environmental Policy Act of 1969 (Public Law 91-190). The Scapegoat Wilderness Act of 1972 (Public Law 92-395).

[8]S. A. Cain, "Environmental Management and the Department of Interior," Politics, Policy and Natural Resources (Edited by D. L. Thompson. New York: Free Press, 1972), pp. 354-362. See also: L. K. Caldwell, "Environmental Manage-

of relationships between the Forest Service and themselves.[9]

By the beginning of this decade, the cry for public participation in the Forest Service decisions affecting the allocation of resources and uses on public forest land was being taken seriously. To the credit of the Forest Service, it took the initiative to implement a number of programs designed to involve the public in inventory, planning, and decision-making stages of national forest management.[10] This change in administrative procedure has been documented as a transition from "professional unilateral" to "democratic participatory" decision-making within Region I of the United States Forest Service.[11] The question of whether any significant change in the Forest Service administrative procedure has occurred is beyond the scope of this paper. It can be said with certainty, however, that legislation affecting the Forest Service relationship to the public has not been significantly altered.

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ment," Environment: A Challenge for Modern Society (New York: Natural History Press, 1970), pp. 161-251. Also: I. M. Hegman and R. H. Twiss, "Environmental Management of the Public Lands," California Law Review (Vol. 58, 1970), p. 1364.

[9]A. W. Bolle, "Public Participation and Environmental Quality," Natural Resources Journal (Vol. 11, July 1971), pp. 497-505. See also: Lally, op. cit., pp. 104-122.

[10]Region I of U.S.F.S. has employed "public involvement" in the following national forest land-use planning units: Beartooth and Absaroka Primitive Areas, Rock Creek, and the Burnt Fork.

[11]R. W. Behan, "Wilderness Decisions in Region I, U.S.F.S.: A Case Study of Professional Bureau Policy Making," (Unpublished Ph.D. dissertation, University of California, Berkeley, 1971).

The Forest Service is being challenged to adapt its procedures to a rapidly changing system of social values. American society is beginning to place a lot of importance on environmental quality, and at the same time has become critical of placing "blind faith" in industrial development. In this era of uncertainty, the Forest Service can be expected to look at its enabling legislation and the fundamental tenets of professional forestry for direction. It is the opinion of the author that neither the legislation nor the professional tenets provide a meaningful framework for the public administration of national forests today. Felix Frankfurter addressed the problems of the Thirties by stating:

> It is idle to feel either blind resentment against 'government by commission' or sterile longing for a golden past that never was. Profound new forces call for new social inventions, or fresh adaptations of old experience. The 'great society', with its permeating influence of technology, large-scale industry, and progressive urbanization, presses its problems; the history of political and social liberty admonishes us of its lessons. Nothing less is our task than fashioning instruments and processes at once adequate for social needs and the protection of individual freedom.[12]

The purpose of this paper is to develop the public trust doctrine as the "instrument" that could fit the environmental needs of public forest management in the Seventies. An important feature of this paper is an understanding of the potential of the doctrine as an administrative framework for

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[12]F. Frankfurter, "The Task of Administrative Law," University of Pennsylvania Law Review (Vol. 75, 1927), pp. 614, 617-618.

the future uncertainties that are likely to face the Forest Service and other resource agencies in their interaction with the public on the allocation of forest uses and resources for the "public good."

Direction

The motivation behind the author's applying the public trust doctrine to public administration of national forests should be made clear at the outset. First, it is the author's opinion that the real potential of the doctrine is in its application at the administrative level of the executive branch of government. Many articles have been written describing the doctrine as the basis for a citizen's right to enforce judicially the "public interest" in any particular environmental issue. This "judicial" application of the doctrine is very attractive, but does not necessarily develop the full potential of public trust law as it might apply to the day-to-day environmental management being carried out by government administrators today. Second, the author feels that Forest Service legislation and case law suggests that elements of "public trust law" are already woven into the ownership and administration of

national forests and into the benefits derived from that forest land. Third, it is the author's opinion that there is no well defined administrative framework from which the Forest Service is basing its "public involvement" programs. Involving the public in the administration of the national forests is an attractive concept, but could turn out to be a pandora's box of "confusion and ineffectiveness" without fundamental guidelines from which to make professional land-management decisions.

The approach taken in this paper proceeds from the known to the unknown. A description of the basic concepts of American trust law and the public trust doctrine make up the second chapter. The author was not able to find any significant material that applied the doctrine of public trust directly to government administration, therefore, chapter three is a combination of identifying elements of public trust law in Forest Service legislation and case law, and an elaboration on the application of the doctrine to Forest Service administration of public lands. The fourth chapter is an effort to superimpose the public trust doctrine on a case study in "unilateral" decision-making by the Forest Service. This type of analysis can serve to

point out the weaknesses in the administrative procedure that the Forest Service has to fall back on today, and at the same time suggest what differences a public trust "framework" might make if similar facts were to surface today. The fifth chapter is a consideration of the implications that can logically be drawn from the application of the public trust doctrine to the Forest Service administration of public forest lands.

The hypothesis to be tested in this paper is that, despite the limited recognition of the public trust doctrine in law (i.e., legislation and case law), there is inherent in the laws of this country and the United States Forest Service a public trust in our national forests; that the resulting trustee relationship provides a sound administrative framework for the Forest Service environmental management of the national forests; and, that this "framework" is comprised of definitive powers and duties of the agency, and rights of the public to protect and promote the national forests for both present and future generations.

So to avoid any misconceptions, the author is not claiming that there is either a Congressional enactment or judicial recognition of a public trust in our national forests. If, however, the aforesaid hypothesis is valid, then a logical response might be to seek Congressional

enactment and/or judicial recognition of the public trust doctrine as the administrative framework for the Forest Service and perhaps other government agencies responsible for administering environmental resources.

CHAPTER II

THE DOCTRINE OF PUBLIC TRUST

Trust Law

American law recognizes a comprehensive body of trust law, but public trust theory has slipped into the background of judicial thought until recently. For purposes of this paper, the author defines the doctrine of public trust as the intention to impose legal obligations upon at least two designated parties for the continuance of an interest held in common by all members of the public. There are fundamental elements of trust law that should be understood before considering the public trust doctrine as a legal framework for administering environmental interests by governmental agencies.[13]

A "trust" is a fiduciary relationship[14] between at

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[13]The following material on trust law primarily originates from the most widely used reference books in the field of trust law: G. G. Bogert, Handbook of the Law of Trusts (St. Paul, Minn.: West Publishing Co., 1963); A. W. Scott, Abridgment of the Law of Trusts (Boston: Little, Brown & Co., 1960); American Law Institute, Restatement of the Law of Trusts, 2d ed., Vol. I (St. Paul, Minn.: American Law Institute Publishers, May 1957).

[14]Fiduciary relation: A person in a fiduciary relation to antoher is under a duty to act for the benefit of the other as to matters within the scope of the relation. American Law Institute, ibid., p. 7.

least two parties with respect to property resulting from an intent to create the trust.[15] The two parties are essentially a trustee and a beneficiary. The trustee is the person who holds legal title to the trust property for the benefit of another. The beneficiary is the person who has equitable title and for whose benefit the trust property is being held or used by the trustee. For example, this paper will be considering a government agency to be the trustee of certain public property for the benefit of the public as beneficiary. The trust property is the interest in the subject matter of the trust. That interest is separated into a legal interest (held by the trustee) and an equitable interest (held by the beneficiary).[16]

There must be some manifestation of an intention to create a trust relationship before a trust is recognized in law. The trust intent is usually written in a trust instrument, which is the document vesting property interests in the trustee and beneficiary. The trust terms are often spelled out in the trust instrument as rights, powers, and duties of the parties for the purpose of promoting and pro-

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[15] Ibid., p. 6.

[16] The distinction between equitable and legal interests originates from the historical separation of legal and equitable courts. Today, the only distinction is that equitable rules and remedies that attach to equitable interests are more flexible than most rules of law. Equitable title is usually a non-possessory interest in property. Black's Law Dictionary, 4th ed. (St. Paul, Minn.: West Publishing Co., 1957).

tecting the trust. If the terms are not expressly excluded, then the usual rights and duties of the parties apply as defined in the substantive body of trust law.

There are two major reasons for creating a trust.[17] The first is simply to dispose of property, which is accomplished by the transfer of legal title to a trustee. The second reason for the creation of a trust is to establish a personal relationship involving rights and duties between the beneficiary and the trustee. Today most trust law has been built up around the former reason for creating a trust. On the other hand, the public trust doctrine emphasizes the relationships between the parties to the trust.

Under general trust principles, the trustee is expressly empowered under the trust instrument, or has implied powers as equitably deemed necessary to carry out the purposes of the trust. Upon acceptance of the trust by the trustee, the trustee is accountable for the following affirmative duties unless expressly excluded in the trust instrument: to administer the trust; to be loyal to the beneficiary; not to delegate those acts he can reasonably perform; to keep and render accounts; to furnish information to the beneficiary upon request; to exercise reasonable care and skill; to take and keep control of the trust property; to protect and to preserve the trust property; to enforce claims

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[17] Ibid., p. 2.

by the trust; to keep the trust property separate; to make the trust property productive; to pay income to the beneficiary; to deal impartially with beneficiaries; to act in accord with the exercise of the power delegated to persons under the trust, if that exercise of power is not in violation of the trust terms.[18]

The duties of the trustee are enforceable by the beneficiary. The equitable remedies,[19] usually more flexible than legal remedies, of the beneficiary are as follows: to compel the trustee to perform his duties; to enjoin the trustee from committing a breach of trust; to compel the trustee to redress a breach of trust; to appoint a receiver to take possession of the trust property and administer the trust; to remove the trustee.[20]

Public Trust

The doctrine of public trust, as defined from the Common law, applies the aforesaid principles of trust law to "public trust property." A critical point in understanding the doctrine of public trust is that "public trust property" is basically an interest in the subject matter of the

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[18] Ibid., pp. 341-432.

[19] Equitable remedies are based upon principles of justice and right, rather than the sanction of positive law. Black's Law Dictionary, op. cit.

[20] Op cit., p. 433.

trust that is important ts the citizenry as a whole. The state or quality of the natural environment is important to the general public as they rely on certain resources and uses that accrue from that environment. Therefore, it would seem logical to consider the implications of juxtaposing the public trust doctrine with the public administration of the national forests--which are a significant part of the natural environment.

According to Joseph L. Sax, a professor of law at the University of Michigan and noted authority on the public trust doctrine,[21] the public trust doctrine is based upon three related principles:

> First, that certain interests--like the air and the sea--have such importance to the citizenry as a whole that it would be unwise to make them the subject of private ownership. Second, that they partake so much of the bounty of nature, rather than of individual enterprise, that they should be made freely available to the entire citizenry without regard to economic status. And, finally, that it is a principal purpose of government to promote the interests of the general public rather than to redistribute public goods from broad public uses to restricted private benefit.[22]

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[21]Professor Sax has authored two major works on the public trust doctrine and a model environmental protection act, parts of which have been incorporated into several state acts. See generally: J. L. Sax, Defending the Environment (New York: Knopf Publishing Co., 1971); J. L. Sax, "The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention," Michigan Law Review (Vol. 68, January 1970), p. 473; J. L. Sax and R. L. Conner, "Michigan's Environmental Protection Act of 1970: A Progress Report," Michigan Law Review (Vol. 70, May 1972), p. 1004; J. L. Sax, "Environment in the Courtroom," Saturday Review (October 3, 1970), pp. 55-57.

[22]Ibid., Defending the Environment, p. 165.

These principles have provided conceptual support for the public trust doctrine being an important legal theory for environmental law. The popular concept of the doctrine is that environmental interests in the air, water, soil, wildlife, etc. are so inherently important to the public as a whole that they are held in trust by government for the benefit of all present and future generations of people.

History

The doctrine of public trust originated in Roman and English Common law.[23] Historically, people have long sought to protect public property rights in rivers, the sea, and the seashore.[24] This notion that public uses of particular natural resources were of special importance has carried over to American law.[25] Our courts have rarely applied the doctrine of public trust, however. Those few cases that have applied the doctrine dealt with lands under navigable waters,[26]

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[23]For historical treatment, see e.g. W. Buckland, A Textbook of Roman Law from Augustus to Justinian 182-85, 2d ed (Cambridge, England: Cambridge University Press, 1932); R. Hall, Essay on the Rights of the Crown and the Privileges of the Subject in the Sea Shores of the Realm, 2d ed. (Cambridge, England: Cambridge University Press, 1875); J. Angell, A Treatise on the Rights of Property in Tide Waters and in the Soil and Shores Thereof, 1st ed. (Cambridge, England: Cambridge University Press, 1826).

[24]Sax, op. cit., Michigan Law Review, Vol. 68, p. 475. See also: Magna Carta and Northwest Ordinance.

[25]Sax, ibid. Martin v. Waddell, 41 U.S. (16 Pet.)367, (1842). Illinois Central Railroad v. Illinois, 146 U.S. 387, (1892); U.S. v. Chandler-Dunbar Co., 229 U.S. 53, (1913).

[26]In re. Crawford County Levee and Drainage District No. 1, 182 Wisc. 404, 196 NW 874, cert denied 264 U.S. 598 (1924).

parklands,[27] shorelands,[28] and wild animals in nature.[29]

Historically, the public rights recognized as basic tenets of water law have never existed in public land law. Individuals have had no separate interests in public land, but have been considered an amorphous body for whose welfare the public land was administered. The public body had no defined legal rights in public land.[30] In 1889 the U.S. Supreme Court recognized the concept of "public trust" in the public domain as a governmental obligation to "protect" and "invest" the trust:

> The public domain is held by the government as part of its trust. The Government is charged with the duty and clothed with the power to protect it from trespass and unlawful appropriation, and under certain circumstances, to invest the individual citizen with the sole possession of the title which had till then been common to all the people as the beneficiaries of the trust.[31]

Congress had the power to regulate public lands, and according to this case was placed in the position of being responsible for managing the public lands held in trust by the Federal

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[27]Davenport v. Buffington, 97 F. 234 (8th Cir. 1899). Gould v. Greylock Reservation Commission, 350 Mass. 410, 215 N.E. 2d 114 (1966).

[28]Shrively v. Bowlby, 152 U.S. 1, 57 (1894).

[29]La Costa v. Department of Conservation, 263 U.S. 545 (1924). Geer v. Connecticut, 161 U.S. 519 (1896).

[30]J. E. Montgomery, "The Public Trust Doctrine in Public Land Law: Its Application in the Judicial Review of Land Classification Decisions," Willamette Law Journal (Vol. 8, June 1972), pp. 135, 152.

[31]U.S. v. Beebe, 127 U.S. 338, 342 (1889).

Government. The management of the national forests was subsequently delegated to the U.S.F.S. This case also stands for the proposition that Congress was in the position, "under certain circumstances," to invest legal title to parcels of the public domain in individual citizens.

Generally, the doctrine of public trust is unsettled as to the difference between the general government obligation to act for the public benefit, i.e. the government police power, and the affirmative and more demanding duty which the government would have as trustee. A trustee is directly accountable to the beneficiaries of the trust, within the clearly established terms of the trust. This sharp delineation of responsibility and accountability on the part of the trustee, is central to the hypothesis of this paper.

Scope

Joseph Sax, in his extensive research of public trust cases, has found that courts have held three types of "trust" restrictions on governmental authority:

> First, the property subject to the trust must not only be used for a public purpose, but it must be held available for use by the general public; second, the property may not be sold, even for a fair cash equivalent; and third, the property must be maintained for particular types of uses. The last claim is expressed in two ways. Either it is urged that the resource must be held available for certain traditional uses, such as navigation, recreation, or fishery, or it is said that the

> uses which are made of the property must be in some sense related to the natural uses peculiar to that resource.[32]

The scope of the public trust doctrine is much broader than has been historically applied in American courts, according to Sax.[33] There seems to be sufficient latitude in the limited number of court decisions (involving the doctrine) for applying the procedural and substantive protections of the "public interest" to government administration of public land. The nature of public and private interests in the allocation of benefits derived from public lands can be said to be changing.[34] Bernard Cohen addresses this change:

> The evolutionary shift from inalienability of public lands to protection of private property rights can probably be explained by the search for "progress" in an age of rapid technological advance. As Mr. Whitney's cotton gin increased production and Mr. Fulton's steamboat plied the navigable waters of a new land in the midst of an industrial revolution, it was assumed that production, navigation, and commerce were the national interest. Protection of the environment was relegated to a secondary role.[35]

Cohen goes on to say that the trust doctrine has "passed through Whitney's cotton gin, emerging somewhat shredded."[36]

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[32]Sax, op. cit., p. 477. See also: Hayes v. Bowman, 91 S2d 795, 799 (Fla. 1957).

[33]Sax, ibid., p. 556.

[34]The issue of balancing interests in environmental issues usually centers upon the effects on economic progress in our free enterprise system.

[35]B. S. Cohen, "The Constitution, The Public Trust Doctrine, and The Environment," Utah Law Review (Vol. 3, 1970), pp. 388, 389.

[36]Ibid.

Today, the application of the public trust doctrine is becoming important as protection of the environment has been elevated to a primary role in public policy by both Congress and the courts throughout the country.

The public trust doctrine is still considered "to have the breadth and substantive content which might make it useful as a tool of general application for citizens seeking to develop a comprehensive legal approach to resource management problems."[37] The doctrine has received prominent attention in recent years from the point of view that it is a legal theory establishing a citizen's right, in his capacity as a member of the public, to sue for protection of the "public interest" in the environment.[38]

This judicial application of the doctrine has inherent weaknesses: First, the approach deemphasizes the administrative and political realities that dominate the day-to-day management of natural resources; second, courts are not best equipped nor are they in the best position to make technical or value decisions in the public interest; third, judicial intervention, i.e., "suing the bastards," has a dramatic appeal to environmentalists, but the courtroom is not usually considered a panacea for the long-term environmental ills of

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[37]Sax, op. cit., p. 474.

[38]See footnotes 21, 30 and 35.

the country.[39] The emphasis upon the enforcement of the public trust seems at best remedial.

The strength of the doctrine lies in the development of a democratic, administrative framework responsive to the public interests in a productive and liveable environment. The doctrine provides the essential elements for a clear determination of a "check and balance" interaction between government administration and the public for managing the environment. Administrative specialization and expertise found in governmental agencies, and public participation are necessary for managing the complex environmental resources of the twentieth century. The strength of the doctrine comes both from the rights of the public to make value determinations as to the proceeds they wish to derive from the trust, together with the duties and powers of the public agencies to make physical determinations in promoting and protecting the trust.

The tenets of the doctrine can be most advantageous to public resource agencies in defining and limiting their responsibilities to environmental management. Due to the broad and often ill-defined enabling legislation of many resource agencies, they are often placed in what seems to

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[39]E. H. Hanks and J. L. Hanks, "The Right to a Habitable Environment," The Rights of Americans (Ed. by N. Dorsen, 1971), pp. 147, 170. See also: R. Beazley, "Conservation Decision-Making: A Rationalization," Natural Resources Journal (Vol. 7, 1967). p. 345.

be an untenable position of determining both the biological constraints, and the public demands on a particular parcel of public land. The Forest Service, for example, is equipped to deal with the biological considerations of forest land management. Not even "philosopher kings," however, are in a position of effectively determining public wants and needs as they relate to the resources and uses that could accrue from public forest lands.[40]

What was once a relatively easy determination of public values has become a difficult task for public administrators today. Concerted market interests (i.e., free play of economic forces determining the resource and use demands on public land) have been in the position of influencing public agencies to exploit natural resources, because until recently the diffuse nature of ecological interests (i.e., balance of biological forces determining the resource and use demand on public land) provided little effective countervailing political pressure. The public trust doctrine could be effective if it served to place the professional forest manager in the position of managing for present productivity and long-term protection of national forests. This could place the task of determining public needs and wants back into the political arena, with the agency (i.e., trustee) acting only as a "catalyst" to the resolution of diverse public interests, and ultimately "registering" the value decisions of the

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[40]Reich, op. cit., p. 13.

public.

The following chapter considers whether the doctrine has the potential of differentiating between the trustee responsibility for the principle of the trust (i.e., management of physical and biological characteristics of the trust), and the beneficiary responsibility for the trust proceeds (i.e., determine the use and benefits of trust income).

CHAPTER III

THE PUBLIC TRUST IN OUR NATIONAL FORESTS

Public Administration Under the Trust Doctrine

There is no explicit legislative enactment of the public trust in our national forests. Judicial interpretation of natural forest legislation and "courtmade" law in general point to an implicit recognition of the trustee relationship between the public and the United States Forest Service. There are a number of reasons for Forest Service personnel to consider the public trust doctrine as a framework for environmental management, the most significant being the clarification of their responsibility for managing public forest lands.

It is understandable, in light of the recent proliferation of environmental lawsuits and the current interest in the public trust doctrine,[41] that governmental agencies might react in a defensive manner toward the doctrine. Ralph A. MacMullen, past Director, Michigan Department of Natural Resources, spoke to the contrary when he responded to being sued by citizens under Michigan's Environmental Protection Act of 1970:[42]

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[41]See footnotes 5 and 38 with accompanying text.

[42]Michigan Comp. Laws Ann. 691.1201-691.1207 (Supp. 1972).

> It is true that the Natural Resources Commission, upon my recommendation, approved construction. . . . It is likewise true that suit has been brought under the Environmental Protection Act by persons who disagree with that decision. The Act--one of the landmark pieces of environmental legislation in the nation--was passed for precisely that reason; to allow dissenting citizens an opportunity to register their dissents in court. Even though we have been made the defendants in this suit, we welcome it as an expression of public interest in the environment, and another step toward redefining the law so that we can better interpret the wishes of the people.[43]

Although judicial enforcement of the trust is a significant factor in the doctrine, the strength of the trustee relationship is in the clearly defined responsibilities of the parties to the trust, thereby serving to lessen conflict between the Forest Service and public in this case. Conflicts that do arise will tend to be more of a political nature between the beneficiaries, generally outside the arena of public administration, and so should not result in negative environmental impacts. The costs of political maneuvering would tend to be more social or economic in nature, especially where resource agencies are accountable for protecting the environment through time.

Forest Service Legislation

The Constitution empowers Congress to dispose of and make needful rules and regulations for the public lands.[44]

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[43]Letter to the Editor, State Journal (Lansing, Michigan, January 28, 1972), A-6, Col. 6.

[44]U.S. Constitution, Article 4, Section 3, paragraph 2: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." See also: U.S. v. City and County of San Francisco, 310 U.S. 16 (1940); U.S. v. Gratiat, 14 Pet. 526, 537.

In March of 1891, Congress delegated that power by authorizing the President of the United States to "set apart and reserve . . . whether of commercial value or not, as public reservations"[45] the forested lands within the public domain. Public use of and the necessary administration of these forest reserves were made legal by the National Forests Organic Legislation of 1897.[46] It wasn't until 1905 that these delegated powers were placed in the newly formed United States Forest Service in the Department of Agriculture.[47] Today, the Federal Government controls nearly 3/4 billion acres of public domain. Over 200 million acres of these federal lands, a diversified resource of timber, minerals, rivers, mountains, wilderness, and aesthetic beauty, are being managed by the Forest Service.[48]

U.S. Forest Service Trustee Relationship

Elements of the public trust in our national forests can be developed to serve as an administrative framework for defining the bounds of professional forest mangement, and the right of the public to participate in the allocation of

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[45]Act of March 3, 1891, 16 U.S.C. 471, 26 Stat. 1103.

[46]Sundry Civil Appropriations Bill of 1897, 16 U.S.C. 471, 30 Stat. 35.

[47]Act of February 1, 1905, 16 U.S.C. 472, 33 Stat. 628.

[48]This 3/4 billion acres is about 1/3 of the total acreage of the United States. See: Public Land Law Review Commission, "One Third of the Nations Lands: A Report to the President and to Congress," (1970), pp. 21, 28.

of national forest resources. Reich suggested the need for such a framework when he said: "The standards Congress has used to delegate authority over the forests are so general, so sweeping, and so vague as to represent a turnover of virtually all responsibility."[49] The trustee relationship, on the other hand, is usually construed by the courts as placing broad, discretionary authority (within the expressed terms of the trust) in the trustee to protect and make productive the trust property, and as giving the beneficiary the right to enforce the trust and deal with the proceeds of the trust (unless specified otherwise) in his best interest.[50]

The proceeds of the trust often depend upon how the trustee decides to "invest" the trust property. It would not seem extraordinary for the trustee to confer with the beneficiary on the needs and wants of that beneficiary, so to, in fact, make the trust "productive" in the best interest of the beneficiary. The specific application of this trustee relationship within the Forest Service will follow a discussion of the identifiable elements of the public trust in our national forest.

The legal interest that American citizens had in public land was long ago transferred to the government in exchange for the government's promise to allocate uses and

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[49]Reich, op. cit., p. 3.

[50]A. W. Scott, Abridgement of the Law of Trusts (Boston: Little, Brown and Co., 1960). pp. 365-370, 398-401.

resources of that land for their benefit. In McColloch v. Maryland, a landmark case in the interpretation of the unenumerated powers of the United States under the Constitution, the court said:

> The Government of the Union, then . . . is, emphatically, and truly, a government of the people. In form and in substance it emanates from them. Its powers are granted by them and are to be exercised directly on them, and for their benefit.[51]

This transfer of power to the Federal Government, and the establishment of a beneficiary relationship between the people and the government, present the fundamental elements of a public trust in those property interests the public believes are essential for quality living by the citizenry as a whole.

As early as 1889, the U.S. Supreme Court in the case U.S. v. Beebe held that, "The public domain is held by the government as part of its trust."[52] Subsequently, the President of the United States was granted authority to set aside and protect forest reserves "for the use and necessities of the citizens of the United States."[53] These public forest reservations were set aside for specified public uses, and were later referred to in our courts as public lands held in "trust" for the public as a whole. In 1910, in the case

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[51]17 U.S. (4 Wheat) 316, 404-405 (1819).

[52]127 U.S. 338, 342 (1889).

[53]Sundrey Civil Appropriations Bill of 1897, op. cit.

Light v. United States, the Supreme Court of the U.S. held Forest Service regulations limiting private grazing rights on national forest lands to be constitutional because, "the government hold (sic) public lands in trust, for the people, to be disposed of so as to promote the settlement and ultimate prosperity of the States in which they are situated."[54] The Supreme Court in that same case recognized a revocable public trust in forest reserves when it stated:

> 'All the public lands of the nation are held in trust for the people of the whole country.' . . . And it is not for the courts to say how that trust shall be administered. That is for Congress to determine. The courts cannot compel it to set aside the lands for settlement; or to suffer them to be used for agricultural or grazing purposes; nor interfere when, in the exercise of its discretion, Congress establishes a forest reserve for what it decides to be national and public purposes. In the same way and in the exercise of the same trust it may disestablish a reserve and devote the property to some other national and public purpose. These are rights incident to proprietorship, to say nothing of the power of the United States as a sovereign over theproperty belonging to it.[55]

This case marked a turning point for the public trust doctrine in that the decision was primarily based upon the proprietorship doctrine (i.e., the government owns the public lands) and only made limited mention of the public trust.[56] That "limited mention" is very important, however, because it established the fact that only Congress can "establish" or

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[54]220 U.S. 523, 530 (1911).

[55]Ibid., p. 536.

[56]Supra, p. 10.

"disestablish" the public trust in our national forests. Further mention will be made on the effect of the proprietorship doctrine upon the public trust in our national forests. The important point to keep in mind is that the government, as trustee, would hold legal title to the forest reserves and thus clearly have "rights incident to proprietorship."[57]

The Forest Service is now under the broad, sweeping mandate of the Multiple Use-Sustained Yield Forestry Act of 1960.[58] In accord with this Act, Congress did not decide to "disestablish" the public forest reserves, but did, in fact, broaden the terms of the public trust in our national forests. This Act directs that "it is the policy of the Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and fish, and wildlife purposes," and "that the establishment and maintenance of areas of wilderness are consistent with the purposes and provisions of section 528-531 of this title."[59] This mandate to the Forest Service also repeats the directive of earlier national forest legislation by stating that management of the national forests will be employed that "will best meet the needs of the American people . . . and provide the maximum benefit for the general public."[60]

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[57]Montgomery, op. cit., pp. 157-60.

[58]16 U.S.C. 528-531.

[59]Ibid., 528, 529.

[60]Ibid., 531(a).

The Multiple Use Act states nothing about national forest "productivity" being synonymous with the generation of revenue from forest practices such as logging. The legislation states that consideration must be given "to the relative values of the various resources, and not necessarily the combination of uses that will give the greatest dollar return or the greatest unit output."[61] Market interests in the environment "appear to be consistently favored by the administrative agencies over 'non-economic' uses such as wildlife protection and recreation."[62] It would be naive to harbor the belief that the Forest Service is not conscious of this political pressure by market interests, and perhaps resource agencies are eager themselves for a respite from such pressures. The Forest Service "public involvement" programs would indicate this at least. However, it would be equally as naive to suppose that this public agency is not feeling the heat of a groundswell of citizens' interest in the environment today.

Political pressure groups, such as Sierra Club, Wilderness Society, and others, are beginning to balance the market demands that have been ever present on the national forests. But, neither the public nor the Forest Service have yet

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[61] Ibid., 531(a).

[62] Montgomery, op. cit., pp. 138-39: "This favoritism stems from political pressure . . . as a result of statutory revue (sic) sharing arrangements which funnel a fixed percentage of the receipts produced from the recovery of public land natural resources back to the local government unit in which the federal land is located."

realized that "instrument" or "process" for arriving at a meaningful complement for achieving a balance of all these public interests, that will still allow the forest manager sufficient latitude for environmental management of our national forests. The U.S.F.S. "public involvement" programs seem to be directed at determining public interests, but could prove to be distracting from the task of environmental forest management by not limiting the political involvement of public administrators.

The National Environmental Policy Act of 1969, is in accord with the public trust doctrine as applied here on the federal level:

> . . . it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the nation may--
>
> (1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations; . . .[63]

Federal courts have recently said that governmental agencies can no longer approach their responsibilities as "umpires blandly calling balls and strikes," rather, they have an affirmative duty to thoroughly and openly study an issue before acting in the public interest.[64] It is important to recognize, as Charles Reich eloquently puts it, "that in a democracy the 'public interest' has no objective meaning

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[63]Public Law 91-190, sect. 101(b)(1). See generally: Hanks, op. cit., "Environmental Bill of Rights."

[64]Hanks, op. cit., The Rights of Americans, p. 169.

except insofar as the people have defined it; the question cannot be what is 'best' for the people, but what the people, adequately informed, decide they want."[65] The National Environmental Policy Act provides for this "public participation" in the decision making processes of administrative government, in addition to framing a national policy for a decent environment: "The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment."[66] The U.S.F.S., within the Department of Agriculture, does come under this national mandate of the National Environmental Policy Act of 1969.

This brief look at Forest Service enabling legislation and the judicial interpretation of some of those laws strongly suggests an implicit public trust in our national forests. The national forest reserves were set aside for particular public purposes, the public was designated beneficiary of the reserve, and the Forest Service was delegated the authority of a trustee for the management of those forest reserves. Based upon court interpretations of public trust cases and the implicit public trust in our national forests, it could be said that: the national forests should be managed for public purposes and yet be available for use by the general

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[65]Reich, op. cit., p. 10.

[66]Public Law 91-190, sect. 101(c).

public; the specified interests of the forest land should not be sold, unless by Congressional declaration; and the forests should be maintained within natural capabilities and productivity over the long run.[67] The present Forest Service directives of "multiple use" and "sustained yield" tie in well with this public trust administrative framework. Further elaboration, however, should serve to point out some substantive differences and, most important for this paper, some significant procedural differences between present public administration and prospective public administration based upon the public trust doctrine.

Important to the public trust doctrine is the complement between the duties and powers of the trustee for managing the trust, and the rights of the beneficiary to enforce the terms of the trust.[68] The result can be a complementary interaction between these parties for maintaining a "productive" public trust. The trustee is accountable for making the trust "productive," but the trustee is seldom, unless expressly stated in the trust terms, placed in the position of making value determinations for the beneficiary.[69] This would suggest that the Forest Service, as trustee, would not

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[67]See footnote 15 and accompanying text.

[68]Supra, pp. 10-13.

[69]Scott, op. cit., pp. 283-287: Spendthrift trusts, discretionary trusts, and trusts for support can be exceptions where the trustee is placed in a position of determining what is "best" for the beneficiary.

be placed in the political position of reconciling the great diversity of public interests and values in public forest lands. The agency might best serve as a "catalyst" for this political process of public value determinations. Involving the public in the initial stages of forest land-use planning could provide reciprocal understanding by the public and the agency of the constraints and values to be considered in a particular land-use decision. Accountability on the part of the Forest Service would be limited to their assuring present "productivity" and guaranteeing long-term alternative uses of the nation's forests. The public would have the right to define what mix of resources and uses was in their best interests.

Although beyond the immediate scope of this paper, brief mention should be made on the logistics of political reconciliation of diverse and perhaps conflicting public interests in public forest land. The essential point here is that the public administrator, as trustee, would be catalytic to political determination of the "public good." Public involvement at all levels of Forest Service planning provides a "quasi-political" format for reconciliation of public interests. If the public interests are polarized, then greater public visibility must be achieved through Congress or, if necessary, through the courts. A more difficult problem here is just how to weigh or even tally public inputs: What about the problem of national versus local,

informed versus uninformed, large special interest groups versus individual expressions of public interest, etc.? There is an important point to make in uncovering this "quagmire." The public trust framework for public administration is basically a conceptual delineation of responsibilities between the administrator and the public, so that the resource administrator does not get caught in this "quagmire" of political reconciliation of diverse and/or conflicting public interests to the detriment of the natural environment he is responsible for managing. Further development of this problem could easily provide the substance of another major paper and, therefore, must be left for another time.

Under the trust doctrine, the public could directly participate in Forest Service resource and use decisions (i.e., proceeds of the trust), and the agency would have discretionary powers for actual forest land management (i.e., protecting and promoting the principle of the trust). The public demands for particular forest resources and uses, as determined between participating public interest groups, would define a "productive" trust, if those demands were within the natural capabilities of the trust property. The Forest Service, as trustee, would be accountable for the final land management decisions. This accountability can be translated into "how well" the Forest Service is able to "fill" the public demands for certain proceeds from the trust,

within the physical and biological constraints of that public trust property.

The Forest Service, again as trustee, could present alternative management plans that would, in their professional judgment, "fit" the capabilities of the forest land. This would place the agency in the position of advocating the best management practices for the land for present "productivity" (to fill present public needs and wants) and future alternative uses. Close interaction with the various public interests during this planning process would place the agency in a good position to predict the particular mix of proceeds the public would like to see coming from the public trust land. The ultimate decision of which alternative (or combination of those presented by the agency) management plan would best fit all the represented public interests, would be a decision for the public within the political arena. The Forest Service would have to register this decision by the beneficiaries of the trust and abide by it if it was within the natural capabilities of the forest land being considered.

Professor Reich notes, "Lawyers know from long experience that disinterested, well-considered decisions are most frequently reached by clearcut separation between those who advocate and those who decide."[70] This "separation" is possible under the trust doctrine, as the trustee advocates

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[70]Reich, op. cit., p. 6.

what land management practices are best for the trust property, and the beneficiaries decide what proceeds are in their best interests. The trustee, however, is accountable for continuing the trust and therefore must make the final decision as to what investment will be made for the trust.

Trust law preference for continuance of the trust and prohibition of the invasion of the body of the trust would place the burden of documenting the reasons why the trustee proceeded with a certain management plan upon that trustee. This burden of proof[71] and substantive trust law would put the Forest Service in the position of basing its decisions on sound technical data, and preparing public records on how and why particular management decisions were made.

Forest Service proprietorship[72] does not lessen the grounds for a public trust in the national forest. Legal title to national forests rests with the U.S. Government and equitable title rests with the public. This point refers back to the citizens giving certain interests over to the U.S. Government in return for the public benefits of government administration, and is in accord with the two reasons earlier stated for designating a trust relationship.[73] Not

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[71]L. L. Jaffe, "Administrative Law: Burden of Proof and Scope of Review," Harvard Law Review (Vol. 79, 1966). pp. 914, 920.

[72]Camfield v. United States, 167 U.S. 526 (1840). See also: Montgomery, op. cit., pp. 158-60.

[73]Supra, p. 12.

only has there been a land transaction from the people to the government, but a definitive trustee relationship could be interpreted as having been established between the Forest Service and the public.

CHAPTER IV

A SPECIFIC EXAMPLE

The Public Trust in the Lincoln Back Country

August 20, 1972, marked the end of a seemingly endless struggle between environmentalists[74] and the Forest Service over the fate of 240,000 acres of de facto wilderness land in northwestern Montana.[75] On that day, the "Scapegoat Wilderness" Bill was signed into law by the President of the United States. This struggle was popularly referred to as the "Lincoln-Back Country Controversy,"[76] and arbitrarily commenced on March 27, 1963, when the Forest Service made public their "Long Range Plan" for development of 177,000

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[74]"Environmentalists" will represent both conservation and environmental interests, for the purpose of this paper, as looking out for the ecological interests of land-use rather than market interests.

[75]Scapegoat Wilderness Act, Public Law 92-395.

[76]For complete development and analysis of this controversy, see: R. W. Behan, "The Lincoln Back Country Controversy: A Case Study in Natural Resource Policy Formation and Administration," (Unpublished paper, University of Montana, 1969); and D. R. Kendall, "The Lincoln Back Country Controversy: A Case Study of Public Land Administration," (Unpublished Masters Thesis, University of Montana, 1970).

acres of national forest land in northwestern Montana.[77] The ensuing controversy was a model example of low-profile decisions made "for the people's benefit" by governmental agencies. This chapter will serve to review the facts of the Lincoln-Back Country and to apply to them the previously discussed tenets of the public trust doctrine. This application of a trustee relationship between the public and the Forest Service should serve to demonstrate the practical use of the doctrine by all three branches of government, with particular emphasis placed on the advantages to the administrative process in managing our forest resources.

The Setting

The Long Range Plan, as it was presented, was to have sweeping effects on a land area well over twice the size of the Lincoln Back Country, but it was the inclusion of this area of land which proved to be the "call to arms" for many environmentalists. The Back Country was a well known land unit encompassing 75,000 acres of national forest within the planned development area. The Back Country had gained an identity as a wilderness-type recreation area over years of use by outdoor enthusiasts throughout Montana as well as the rest of the country. Despite this accepted fact, neither

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[77]Long Range Plan, Northern Half Lincoln Ranger District, Helena National Forest (U.S. Department of Agriculture, Forest Service, Northern Region, March 1963).

the general public nor environmental interest groups were made aware, prior to the issuance of the Long Range Plan, of the U.S. Forest Service consideration to develop these 177,000 acres of public land. The Long Range Plan called for timber harvest, recreation development, dispersement of hunting and fishing, and construction of related roads into this de facto wilderness.

In 1960, the Lincoln Back Country Protective Association was formed as a citizens effort to:

> . . . encourage protection of wilderness, water, wildlife, forest and field; to seek wise use of land and water in broad public interest, nurture and improve wildlife stocks; and restore and rehabilitate wildlife environment.
>
> To sponsor and support legislation designed to end methods and activities destructive to natural resources and to institute methods seeking to replenish and renew a sound resources economy.[78]

Perhaps the formation of this organization, three years before the appearance of the Plan, was an intuitive response in anticipation of a threat to the Lincoln Back Country.[79] By the summer of 1962, the Association began enlisting broad public support for protecting the "wilderness" encompassed in this 75,000 acres of national forest. It was also about

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[78]Constitutional By-Laws of The Lincoln Back Country Protective Association, Article 2 (Unpublished, Lincoln, Montana).

[79]The Multiple Use Act of 1960 had just recently passed. In addition the Forest Service was in the process of transition from an era known as "custodial management" to what is now recognized as "intensive management"; see also, M. Clawson and B. Held, The Federal Lands: Their Use and Management (Lincoln: University of Nebraska Press, 1957), pp. 29-36.

this time that the Helena National Forest Advisory Council voted six to two in favor of supporting the Forest Service in their long range multiple-use planning for the Lincoln Ranger District. It was later pointed out that the Council was thinking in terms of hundreds of years, rather than the five or ten years being considered by the U.S.F.S. as long range planning in this case. The Council was composed of the following private citizens during the Back Country controversy:

> The Chairman, the owner of a Helena hardware store
> A farmer, representing the water users and irrigation interests
> The owner of a large sheep ranch
> A professional educator
> A cattle rancher
> A commercial guide and packer
> A logging contractor from Lincoln
> A representative from a smelting and refining company in Helena
> A Helena newspaperman
> The owner of one of the cafes and motels in Lincoln
> A representative of the State Board of Equalization
> A representative of the State AFL-CIO[80]

Three members were absent when the vote was taken, and the chairman did not vote.

The public announcement of the Forest Service Long Range Plan met with quick and intense public opposition. Resistance coalesced around the feeling that the Forest Service had acted in a deceptive manner, and developed from a strong public sentiment for the Lincoln Back Country per se. Environmental groups were conspicuously absent from an advance mailing of the Long Range Plan by the Forest Service. On

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[80]Behan, op. cit., p. 17.

April 19, 1963, a public "meeting" was held upon a public request for a "hearing." An equal time regulation was enforced at the meeting and a public request for a vote of disapproval was denied by the U.S.F.S. Concerned citizens were beginning to realize the unwillingness and seeming inability of the U.S.F.S. to respond to expressed public interest against development of the Lincoln Back Country and contiguous national forest land.

The efforts by citizens and environmental groups to "delay" implementation of the Long Range Plan, at least until a thorough resource study could be made, were thwarted by what seemed to be determined efforts of the Forest Service to develop this public forest land area.[81] These citizens called upon the Montana Congressional delegation in desperation. Wilderness classification for the Lincoln Back Country was proposed during the 1965 Congress.[82] It is ironic to note that neither of the parties to this controversy was originally asking for wilderness classification. Six years of Congressional proposals for wilderness classification and four proposals by the Forest Service for development of this national forest land intervened before the Forest Service came on record as recommending wilderness classification of

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[81]See footnote 4 and accompanying text.

[82]Senate Bill 107, and House of Representatives Bill 7366.

this area in August, 1971.[83] The Scapegoat Wilderness is a reality today, and we are left wondering if the public interest was served by this confrontation between the Forest Service and the environmental interests.[84] Perhaps wilderness classification of this area was more the result of the defensive reactions on the part of both parties to this controversy, than the expressed public interest in a wilderness use of the area.

The Trustee Relationship

The important feature of the trust relationship is the complementary interaction between the citizenry and the Forest Service to promote the "usufruct"[85] of our national forests. Usufruct, in this case, would be the public benefit derived from government management of the present use of the national forests without altering the long-term use options

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[83]A Proposal: Scapegoat Wilderness, Helena, Lolo, and Lewis and Clark National Forests, Montana (U.S. Department of Agriculture, Forest Service, August 1971).

[84]Perhaps wilderness classification in this case was simply the result of a public emotionally reacting to the defensive posture that the Forest Service assumed at being rebuffed in their effort to define the "public good" in forest land management.

[85]A. W. Scott, Abridgment of the Law of Trusts (Boston: Little, Brown & Co., 1960), p. 19. "Many of the functions which are performed in the Anglo American system by the use of the trust were performed in the Roman Law through the usus or usufructus . . . and in the modern civil law by the modern equivalents of these devices." The presumption of this paper is that no equivalent of "usufruct" has yet been adapted to public forest management.

of the particular forest site involved.

As stated earlier, there is a trust law preference for continuance of the trust and the prohibition of invasion of the principle of the trust.[86] This preference could be translated by the courts into a specific duty by the Forest Service to maintain the natural uses of a particular forest site if this meets with approval by public interest groups.[87] The Lincoln Back Country was de facto wilderness and had limited alternative use potential,[88] and, therefore, it could be said under the public trust doctrine that the Forest Service acted in derogation of its affirmative duty to protect the trust, when it attempted to develop the Back Country, especially without consulting the most vocal of public interests concerned with the area.

The terms of the trust, as derived in particular from the Multiple Use Act of 1960, provide optional land uses for management,[89] including wilderness. That legislation, however, does not clearly define the duties and powers of the

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[86]See footnote 71. See also: State v. Cleveland and P.R.R., 94 Ohio 61, 80; 113 N.E. 677, 682 (1916).

[87]See footnote 32. The example of an appropriate use of San Francisco Bay is often used as an example to show what a "natural" or "traditional" use would be. A public trust imposed upon the Bay area would allow construction of a dock or marina but would not allow filling the Bay with garbage or for a housing project.

[88]Kendall, op. cit., p. 11.

[89]16 U.S.C. 528-531.

the Forest Service as trustee, and rights of the public as beneficiary. A commensurate accountability and responsibility should attach to each of these respective duties and rights.

Under the public trust doctrine, the courts might construe a public right to impose the citizens' wishes upon the administrative decision-making process insofar as they wish to demand certain uses and resources from the public trust. The Forest Service would have the complementary duty of providing the public with all relevant information for determining the potential of the forest land. This duty includes the development of a complete record of all technical considerations and alternative forms of management. In Scenic Hudson Preservation Conference v. Federal Power Commission, Judge Paul R. Hays held:

> The record on which it bases its determination must be complete. The petitioners and the public at large have a right to demand this completeness. It is our view, and we find, that the Commission has failed to compile a record which is sufficient to support its decision. The Commission has ignored certain relevant factors and failed to make a thorough study of possible alternatives to the Storm King project.[90]

As in the above case, the Forest Service failed to conduct a thorough resource study of the Lincoln Back Country, and failed to offer alternative plans until 1971, that were based

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[90]354 F2d 608 (2d Cir. 1965), cert. denied 384 U.S. 941 (1966).

upon the public interests in the area.[91] In addition, the broad range of public interests were excluded from the decision-making process at several levels; in initial studies, on the Helena National Forest Advisory Council, and in the advance mailing of the Plan.[92]

The proceeds that result from investment of trust property must be "reasonable" and within the terms of the trust.[93] National forest legislation sets out directives, that could be considered trust terms, for forest mangement that "will best meet the needs of the American people . . . and provide the maximum benefit for the general public." It seems only reasonable that the trustee in this case would confer with the beneficiaries to realize what their "needs" were, so to provide "maximum benefit" for them. The Forest Service in the Lincoln Back Country Controversy did not adequately determine the "needs" of the public, or, more appropriately, did not allow the political process to work out the "public interest" in that case. The public turned to Congress to counter the Forest Service "determination" to develop this public land. Concerned citizens seemed to have no other effective checks upon the agency. The trust relationship could have provided initial agency interaction with the public, allowed the political process to run its natural

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[91]See also: Burlington Truck Lines, Inc. v. U.S., 371 U.S. 156, 168 (1962).

[92]Supra, p. 40.

[93]Scott, op. cit., pp. 359, 370.

course, and if necessary, could have served to establish the citizens' rights to judicially enforce the public trust in the Lincoln Back Country.

Enforcing the Public Trust

Did the members of the Lincoln Back Country Protective Association[94] have an enforceable public right to be informed of, and involved in, a prospective change in the status quo, regarding classification and use of the Lincoln Back Country as managed by the U.S. Forest Service? Does the public have a legal right to a thorough resource study of the relative values involved in the Lincoln Back Country and an impartial report of such a study with alternative management plans by the U.S.F.S.? According to trust law, the beneficiaries of the public trust in our national forest have equitable remedies[95] for enforcing the terms of the trust and the duties of the trustee.[96] Initial consideration will be given to whether the Lincoln Back Country Protective Association's differences with the U.S.F.S. would be subject to court action for protection of public interests in our national forests in 1973. A brief discussion of the legal application

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[94]Supra, p. 41.

[95]An "equitable remedy" is a means by which a natural right or justice is enforced under the more flexible rules of equity. Some examples would be writ of mandamus, injunction, specific performance, and recission in equity.

[96]Supra, p. 13.

of the public trust doctrine to the merits of this case will follow.

Federal Government Jurisdiction

Litigation in this case doesn't appear to require a waiver of sovereign immunity and authorization of judicial review by the U.S. government. There are generally two exceptions to the rule of sovereign immunity: first, where an agent's powers are limited by statute and his actions are beyond that scope of power, and second, where an act is unconstitutional or pursuant to an unconstitutional statute.[97] Usually in cases that are similar to that anticipated here, review is granted under Section 702 of the Administrative Procedure Act, which provides:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of the relevant statute, is entitled to judicial review thereof.[98]

Section 704 provides in part:

> Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review . . .[99]

These statutory provisions establish Congressional intent to make final agency action reviewable in the federal

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[97]Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949).

[98]5 U.S.C.A. 702.

[99]Ibid., section 704.

courts unless otherwise provided.[100] There is no right of review where a statute precludes judicial review or where a decision is committed to the discretion of an agency.[101] Forest Service legislation gives no express provisions precluding judicial review.[102] The question of "discretion" is explained in Knight Newspapers, Incorporated v. United States:

> A court may not review a decision committed to the discretion of an agency pursuant to a permissive type statute, but may do so where the decision was made pursuant to a mandatory type statute, even though the latter decision involves some degree of discretion.[103]

Decisions by the Forest Service under the Multiple Use-Sustained Yield Act of 1960, have been found by the courts to be mandatory and subject to judicial review.[104] In Gandt v. Hardin, the court concluded that in regard to the Multiple Use Act of 1960, "Congress was not enacting a permissive statute, but rather adopted a mandatory statutory list of factors to be considered in the development of the national forests."[105] The mandatory nature of the Multiple Use legis-

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[100]Abbot Industries v. Gardner, 387 U.S. 136 (1967). "Only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review."

[101]5 U.S.C. 701a.

[102]Montgomery, op. cit., p. 144. Hearings before the Subcommittee on Forests of the Committee on Agriculture on the Subject of a Long Range Program for National Forests, 86th Congress, 1st Session, p. 39 (1959).

[103]395 F.2d 353, 358.

[104]Gandt v. Hardin, Civil No. 1334 (W.D. Michigan, 1969).

[105]Ibid., p. 12.

lation strongly suggests the affirmative duty of the Forest Service in that case. In two more recent cases, federal courts have granted jurisdiction for citizens to review the mandatory actions of the Forest Service.[106] Although there is substantial precedent for courts allowing judicial review under national forest legislation, the scope of that review once granted is usually very narrow in that courts hesitate to set aside administrative determinations.[107]

Standing to Sue

"Standing" is the court determination of whether a person is the proper party to seek court review and whether there are the necessary adverse legal interests to the controversy.[108] The principle of standing is based on a test made up of two parts: the "injury in fact" test, and whether the interest is within the "zone of interests" to be protected or regulated by statute or constitutional guarantee.[109] The

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[106]The West Virginia Highlands Conservancy v. Island Creek Coal Co., Civil No. 70182-E (N.D. West Virginia, June 1970). Parker v. United States, 309 F. Supp. 593 (D. Colorado, February 1970).

[107]For development of this point, see Montgomery, op. cit., pp. 142-51.

[108]R. C. Keck, "Standing to Sue--and Public Timber Resources," Natural Resources Lawyer (Vol. 3, July 1970), p. 444. K. C. Davis, "The Liberalized Law of Standing," University of Chicago Law Review (Vol. 37, 1970), p. 450.

[109]Barlow v. Collin, 397 U.S. 159 (1970). Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150 (1970).

most recent case on "citizens" standing in environmental lawsuits, Sierra Club v. Morton, 1972, "requires that the party seeking review be himself among the injured," to sufficiently lay the basis for standing under the Administrative Procedure Act.[110] This case will be discussed in detail as it is central to the standing question. The Lincoln Back Country Protective Association (LBPA) could assert Section 702 of the Administrative Procedure Act which allows judicial review where citizens are adversely affected or aggrieved under mandatory legislation.[111]

In the case Scenic Hudson Preservation Conference v. Federal Power Commission, 1965, the court said:

> In order to insure that the FPC will adequately protect the public interest in aesthetic, conservational, and recreational aspects of power development, those who by their activities and conduct have exhibited a special interest in such areas, must be held to be included in the class of 'aggrieved' parties under section 313(b).[112]

The Lincoln Back Country Controversy centered on the public interest in the "aesthetic, conservational, and recreational" uses of national forest land that might have been destroyed by extensive Forest Service development.

The District Judge in Road Review League, Town of Bedford v. Boyd, 1967, expanded on the Scenic Hudson case by saying:

I have based my decision (as to plaintiff's standing)

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[110] 92 S.Ct. 1361, 1366 (1972).

[111] 5 U.S.C.A. 702.

[112] 354 F.2d 608, 616 (1965).

> upon the implications, rather than the exact holding, of the recent decision of the Court of Appeals in Scenic Hudson.
>
> The Administrative Procedure Act (5 USC 702) entitles a person who is 'aggrieved by agency action within the meaning of the relevant statute' to obtain judicial review.
>
> I have concluded that these provisions are sufficient, under the principle of Scenic Hudson, to manifest a Congressional intent that towns, local civic organizations, and conservation groups are to be considered 'aggrieved' by agency action which allegedly has disregarded their interests.[113]

Persons who have "environmental" interests in protecting the aesthetic and diverse quality of de facto wilderness in national forests have been granted standing to appear in Federal Court to challenge Forest Service actions in disregard of their interests.[114]

Individual members of the LBPA would have to allege particular injury before the LBPA would be granted standing to represent those aggrieved persons. On April 19, 1972, the Supreme Court of the United States held that the Sierra Club, a leading environmental organization, did not have standing to challenge Forest Service approval of a thirty million dollar resort development in California's Mineral King Valley, a prized wilderness area within the national forest.[115] The

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[113]270 F. Supp. 660 (1967).

[114]Gandt v. Hardin, Civil No. 1334 (W.D. Michigan, 1969). The West Virginia Highlands Conservancy v. Island Creek Coal Co., Civil No. 70182-E (N.D. West Virginia, June 1970). Parker v. U.S., 309 F. Supp. 593 (D. Colorado, February 1970).

[115]Sierra Club v. Morton, 92 S. Ct. 1361 (April 1972).

Supreme Court held that the "injury in fact" test for standing, "requires that the party seeking review be himself among the injured."[116] The Sierra Club, in its pleadings, did not allege that it or its members would be affected in any of their activities or pastimes by the resort development. The Supreme Court in this same case explained that the interest alleged to have been injured could be aesthetic, conservational, recreational, as well as economic. And the Court said that once judicial review was properly invoked by individual members of the Sierra Club as "injured in fact" and within the "zone of interests," then the organization "may argue the public interest in support of his claim that the agency has failed to comply with its statutory mandate."[117] The LBPA would have to allege individualized injury of its members to obtain standing. Since the membership of the LBPA is made up of local residents and active users of the national forest land in question, the procedural requirement of standing would probably have not been difficult to satisfy.

Substantive Issues

The question of judicial intervention in the Lincoln Back Country Controversy is moot today because of the recent Congressional enactment of the Scapegoat Wilderness Bill. The facts of the controversy are being used in this paper

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[116] Ibid., p. 1366.

[117] Ibid., p. 1367.

because they serve to demonstrate the dramatic conflict that can result when the public is not involved in the public administration of the national forests. This section is addressed to the particular allegations that could be raised in court today if this controversy surfaced in 1973.

Given the facts of this controversy, it seems that the U.S.F.S. consideration, adoption, and promotion of its Long Range Plan and subsequent plans for development of national forest lands which included the Lincoln Back Country can be considered arbitrary, capricious, and in contravention of their affirmative duty as trustee of the public trust in national forest reserves. Forest Service legislation since the onset of the Lincoln Back Country Controversy in 1963 serves to further define the duties of the Forest Service as trustee and, therefore, will be a part of this analysis.[118]

The terms of this trust as seen in national forest legislation and substantive trust law establish the powers and mandatory duties on the part of the Forest Service to protect and promote certain public uses in national forests. One of those public uses under the Multiple Use Act of 1960 and the Wilderness Act of 1964 is wilderness.[119] The Forest Service generally ignored the alternative of wilderness

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[118]Wilderness Act of 1964, 16 U.S.C. 1131. National Environmental Policy Act of 1969, Public Law 91-190.

[119]16 U.S.C. 529. 16 U.S.C. 1131.

management (with the exception of some 18,000 acres of roadless "scenic area") until overwhelming political pressure was brought to bear through Congress pressuring the agency to change its position.[120] In addition, the Forest Service failed to thoroughly study the resource and use capabilities for this forest area, especially in view of the "public interest" in the de facto wilderness area that had long been referred to as the Lincoln Back Country. The various public interests in this national forest land were not a meaningful part of the administrative decision-making process. Public hearings were not held on the initiative of the agency nor upon request of the environmentalists concerned with the management plans for the area. There were public meetings held for the purpose of the Forest Service to justify its decision to develop the area.

The trustee relationship would put the Forest Service in a position of giving reasons or justifications for its actions, upon a prima facia[121] showing by the Lincoln Back Country Protective Association that Forest Service actions were in disregard of the terms of the trust. A prima facia case would probably have been limited to showing disregard of trustee duties and/or potential detrimental effect to

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[120]See footnote 82 and accompanying text.

[121]"Prima Facie Case" is one that has proceeded upon sufficient proof to that stage where it will support finding if evidence to contrary is disregarded. Black's Law Dictionary, op. cit.

public forest land. Preparation by the public for such a judicial confrontation would be expedited by the trust law requirement that the trustee must provide records and accounts of all trust activities, including how and why certain management decisions were made.[122] The public, often being the plaintiff bringing the suit, would have to sustain this initial burden of proof.[123] Without a public trust administrative framework, citizens' access to information is costly and often impossible because government agencies are often privy to it. The public trust could serve to provide the public with immediate access to information and could more readily shift the burden of proof onto the agency for defending its actions.

Judicial enforcement of the public trust is the weakest link in the application of the public trust doctrine to the environmental problems facing this country. Sax explains the significance of the doctrine in our courts by stating: "the fundamental function of the courts in the public trust area is one of democratization."[124] He explains the term "democratization" by stating that the role of the courts is not to "usurp" but rather to serve as a "catalyst" of the

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[122] Supra, p. 12.

[123] It is usually the rule of evidence that the party asserting the affirmative side of an issue, most often the plaintiff in a case, must sustain the burden of proof. Black's Law Dictionary, op. cit.

[124] Sax, op. cit., p. 561.

legislative process.[125] In this same vein, the role of the public administrator is not to "usurp" but rather to serve as a "catalyst" of the political process for reconciling diverse public interests.

The application of the public trust doctrine must go beyond judicial intervention of administrative decisions. Government administration of environmental resources is where most people should realize the day to day reality of the democratic process. The application of the doctrine to the public administration of natural resources could provide the necessary framework for preventing environmental degradation, rather than trying to remedy despoilation after the fact.

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[125] Ibid., p. 157.

CHAPTER V

IMPLICATIONS

The conceptual and legal support for applying the public trust doctrine to government administration of national forest lands should be somewhat clear in the reader's mind. It is not yet clear, however, whether an administrative framework based upon this doctrine would significantly change (for the better) this "vast experiment in public administration." Would the trustee relationship, for example, provide a truly democratic basis for professional management of forest resources? How would the political process work for determining the "public interests" (i.e., needs and wants at any point in time) on a particular parcel of public forest land? There are no definite answers to these questions. The implications that can be drawn from applying a trust relationship to national forest management should, however, help direct our thinking.

Control over the ultimate allocation of forest resources and uses could be in the hands of the public, as beneficiaries of the public trust in our national forests, under the public trust doctrine. One must hasten to add that the Forest Service, i.e., trustee, would have the power to manage the national forest lands for present productivity

for the benefit of the American people and to guarantee the alternative use options for future generations of Americans. The implication is that public interest groups would have to alter the terms of the trust through Congress to provide for a particular use of public forest lands inconsistant with present and long-term capabilities of the land. The Forest Service would only be responsible for forest management based upon a productive and continuing trust for the impartial benefit of all present and possible future "public interests."

Forest lands are most often capable of supporting varied resources and uses beneficial to different segments of the public. Trade-offs and compromises are inevitable under these circumstances. Alternative management plans can be formulated, with public participation, under the direction of the professional forest administrators. These plans should reflect the physical and biological carrying capacity of the forest land in question. The determination of which plan should be implemented is primarily a political question of reconciling divergent public interests.

Under the public trust doctrine, these value determinations would usually be left to the political process. The public administrator would be catalytic to these processes, but would not be accountable for determining or reconciling the needs and wants of the interested public. The Forest Service, then, would only "register" the public

decision as to the particular mix of resources and uses needed. If that decision was commensurate with the carrying capacity of the land, which it should be if public interest groups participated in the initial Forest Service planning process, the agency would implement the management alternative chosen by the public.

A strength of the public trust framework for administration of environmental resources is that the costs attached to the planning process (with direct public involvement) would likely be social and economic in nature, rather than being detrimental to the forest ecosystem. When the public administrator has the power to protect the trust property from "invasion," and does not have to compromise the capability of the trust property, which could likely occur through political involvement by public administrators, then the public administration of a "quality" environment is possible.

If the particular public interests--this is assuming they are identifiable--are not able to reach a compromise as to the "best" mix of resources and uses for all publics participating in the "administrative" planning process described above, then the public would have to turn to available legislative or judicial remedies. As stated earlier, the public administrator is not in the position to "usurp" the role of a politician, legislator, or judge. The public administrator, at best, is able to initiate public involvement and interest in determining what might be in the citizen's"best interest."

In the case of the Forest Service, the professional forester is faced with the task of managing forest land to maximize present public benefits and protect future alternative uses, rather than being distracted by the impossible task of reconciling the diversity of public interests in that forest land.

Another strength of the public trust doctrine is found in the "checks and balances" available to carry out the trust intent. Both the trustee and the beneficiary have responsibilities under trust law for continuance of the trust within the terms of the particular trust. The authority for maintaining and protecting the trust is vested in the powers and duties of the trustee, rights of the beneficiaries, and ultimately in the courts of this land. The sharply defined responsibilities under trust law would allow for effective judicial enforcement, if necessary, of the trustee's duties in carrying out the trust intent. The trustee, on the other hand, has the power to protect and make productive the trust property. These checks and balances are within the best traditions of our democratic form of government.

Without the public trust framework of public rights and administrative powers to promote and protect our national forests, the elements of representative democracy seem to be missing, and the social and economic costs often attached to resource allocation decisions are taking a significant toll on the natural environment and indirectly on man himself.

CHAPTER VI

CONCLUSION

This paper has demonstrated the conceptual and legal basis for the application of a public trust doctrine to the public administration of national forest reserves. In addition, the paper offers the trustee relationship, elements of which are already inherent in the Forest Service management of national forests, as a meaningful framework for putting the "public" back into public administration and limiting public administrators to a role of catalytic agent to the political process. Biological and physical knowledge of the environment is an important factor in managing any natural environment; but, the human wants and needs within that environment--and which can best be defined by those very inhabitants--are as important and must be considered in the environmental management decisions. If the public is not able to determine what is best for themselves, then there is always the risk that government bureaucracies will dictate a life-style different from what man wants.

The "environmental Seventies" could be marked by the large number of citizens concerned with and wanting to do something about restoring and maintaining environmental quality for present and future use. Government agencies

have an opportunity to capitalize on this public demand for a meaningful role in the administrative decision-making process. What is needed, then, is a clear statement of "defined" responsibility delegated to governmental agencies and a corresponding right by the public for working together to achieve a quality environment.

The public trust doctrine delegates the responsibility for promoting and protecting trust property. This doctrine can serve to bridge the fundamental problems facing both the public and the Forest Service in managing the national forests today. Citizens concerned with the state of the environment feel they have lost control to government agencies in effecting meaningful change for meeting public needs and wants. On the other hand, the government agencies have such broad, sweeping delegations of power that they are being held responsible for man's negative impact on the natural environment. The public trust in the national forests sets out the duties and powers of the Forest Service, and the rights of the public, for a complementary management effort. The responsibility on the parts of both parties for environmental management of forest resources is present under the public trust doctrine.

Judicial recognition of the public trust in environmental resources is not likely in the next few years, when it will be needed most. Bernard Cohen referred to the state of the public trust doctrine in the context of the famous

civil rights case of Brown v. Board of Education,[126] when he stated: "It will take scholarly research, imaginative pleading, skilled advocacy, and an informed court to hand down the 'Brown' of environmental rights."[127] As a practical matter, few lawyers know about the possible application of the public trust doctrine. If they know about it, few are risking the immediate objectives of their clients for the possibility of establishing a landmark precedent for a public trust in the environment.[128]

The public trust doctrine will probably have to be explicitly stated in a legislative enactment or as a constitutional amendment. Public trust legislation should contain at least three elements if it stands a chance of proving to be an effective framework for public administration of environmental resources and uses. First, the nature and extent of the trust must be sharply delineated. If the distinction between the "subject matter of the trust" and the "public interest in the trust" is clear, there is less threat to proprietory interests by government and private individuals.[129]

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[126]349 U.S. 294 (1955).

[127]Cohen, op. cit., p. 392.

[128]It has been noted that attorneys concerned with establishing environmental policy through the courts are able to plead alternative theories in their briefs, just for the purpose of covering themselves in the event a judge does not accept one of the doctrines used to support a client's position.

[129]Supra, pp. 14, 24, 37.

Second, there should be an express designation of the trustee and the duties and powers necessary for effective management of the trust. For example, the limitation of trustee responsibility to managing present productivity and guaranteeing future public uses could be a part of this statement. Finally, the beneficiaries of the public trust should be defined as those persons, in their capacity as members of the public, who are intended to benefit from the trust. Rights and accompanying responsibilities of the beneficiary class must be stated. For example, the beneficiaries should have the right to enforce the terms of the trust and the duties of the trustee in equity. It could also be stated that the beneficiary has no right to infringe upon the trustee's duties to reasonably carry out the trust intent, except insofar as the management affects the receipt of proceeds by the beneficiary.

The public trust doctrine is not a panacea, but is simply a framework for combining the concerns of citizens with the professional management by government administrators for working together on the problems of man's interaction with the environment. It is a delegation of clearly defined responsibilities to these parties, both very necessary for determining the "public good" in the allocation of natural resources. It is a framework that allows for changing priorities in public policy and for constant alteration in the terms of the trust through legislation. It is a mechanism

by which the agency has flexibility to apply its expertise, and the public has the right to actively participate in the determination of their "best interests" through the allocation of natural resources. It is the public right to enforce the trust, and the agency power to promote and protect the trust.

The public can become an integral part of the public administration of the national forests by implementation of the doctrine of public trust. Government agencies stand to gain by encouraging the public to accept the responsibility that accompanies the right to participate in forest-resource allocation decisions. Citizens stand to gain by satisfying their needs and wants in public forest lands through their participation in forest management for their own best interests. The Forest Service must put its trust in the people before that agency will realize its potential as professional manager of the trust the people have put in our national forests.

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